Nos. 540 and 548

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 540

WASHINGTON GAS LIGHT COMPANY, *Petitioner*,

v.

VERNON V. BAKER, *Respondent*.

No. 548

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Petitioner*,

v.

VERNON V. BAKER, *Respondent*.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR VERNON V. BAKER IN OPPOSITION.

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OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the District of Columbia Circuit (not yet officially reported) appears at R. 1041-1053. The Opinion of the District Court (not reported) appears at R. 10-18. The Opinion and Order of the Public Utilities Commission of the District of Columbia, dated November 9, 1949, appears at R. 77-117 (83 PUR NS 4).

JURISDICTION.

The judgment of the Court of Appeals was entered on December 21, 1950 (R. 1054). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 43-705 of the District of Columbia Code (1940). (Act of March 4, 1913, 37 Stat. 989, Ch. 150, § 8, par. 65; amended, August 27, 1935, 49 Stat. 882, Ch. 742, § 2.)

QUESTIONS PRESENTED.

The basic issue is whether the Court of Appeals exceeded a proper scope of review in the grounds it assigned for affirming the Order of the District Court (R. 19), which vacated and set aside the Order of the Commission and remanded the case for further proceeding. Petitioner's designation of questions are confusing and do not clearly set forth the basic issues. Respondent sets forth the following as a clearer statement of the questions presented:

1. Does the scope of review delineated in the *Hope* case prohibit a Court of Appeals from invalidating an order of an administrative agency on the grounds of absence of necessary findings and lack of substantial evidence?

2. Did the Court of Appeals in invalidating the order of the Commission on the grounds of inadequacy of the record and findings with regard to the rate of return, abandoned property and the standby plant substitute its judgment for that of the Commission in the selection of a formula for the determination of the reasonableness of rates?

3. Was the Court of Appeals precluded from invalidating the order of the Commission on the grounds of absence of findings and inadequacy of record with respect to rate of return when the Commission made no record or finding on such issue?

STATUTES INVOLVED.

The pertinent provisions of the District of Columbia Code (1940) are set forth in the Appendix.

STATEMENT.

The Opinion Below.

The Court of Appeals held that the Commission's order granting a rate increase was invalid "because of the inadequacy of the record and findings with regard to the rate of return, abandoned property and the standby plant." (R. 1053.) In its Opinion, the Court below observed that the Commission "made no inquiry whatsoever into issues necessary to determination of a fair rate of return." (R. 1044.) The Opinion, referring to *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 88 L. Ed. 333, specifically cited the absence of any evidence on or consideration of the costs of capital and comparisons with the return on investments in other enterprises having a similar risk factor. The Court concluded that (R. 1045):

> "Failure to subject this issue to inquiry at the hearing and the consequent inadequacy of the record and the findings render the Commission's conclusion that the rates are 'reasonable, just and non-discriminatory' devoid of substance and wholly ineffective for its purpose."

In its discussion of the abandoned and removed property (West Plant) and the unused standby plant (East Plant), which were included by the Commission in the rate base in an amount stated to represent the unrecovered cost of such properties, the Court of Appeals, unlike the District Court, held that the provision of Section 43-306 of the District Code did not require the exclusion of such property on the ground that it was not "used and useful in the public service." In view of this statutory interpretation, the Court concluded that the composition of the rate base was within the province

of the Commission under the doctrine of the *Hope* case. The Court held, however, that the principles of that case required that, if such property is to be included in the rate base, it must be done on a basis which protects both the interests of the investor and the consumer. Bearing on this problem, the Court stated was the question whether the investors have in the past been compensated for assuming the risk that the property would become inadequate or obsolete before the investment in it was entirely recovered. The Court did not presume to make a determination of this fact and stated that such an inquiry must be made in the first instance by the Commission. The Court's criticism was directed to the fact that, although the Commission's conclusion depends upon the premise that inadequate charges for depreciation were made in the past which resulted in lower revenues to investors than they would otherwise have received, the record contains no evidence upon which the soundness of this premise could be tested. (R. 1050)

The Court below also raised questions about the Commission's determination of the rate base and the treatment of conversion costs. Since the case was decided on the grounds discussed above, the Court stated there was no need to discuss the question of whether there was sufficient evidentiary support for the Commission's treatment of these items. The Court pointed out, however, that there was lack of clarity in the record as to the method used by the Commission in arriving at the rate base. The Court noted the failure of the Commission to refer in its Findings and Opinion to the basic valuation order (R. 796-912), and to the absence of a computation of net additions since the date of such order. With respect to conversion costs, the Court took the view that under the *Hope* case, it is for the Commission to determine whether such costs are includible in a rate base, even though not reflected in tangible property additions to the company's plant. The Court also pointed out that conversion resulted in benefits to the investor as well as to the consumer, and that, therefore, the propriety of the inclusion of such costs

in a rate base should be determined in the light of a balancing of the investor and consumer interests. (R. 1052)

The Petitioners have sought to cast the Opinion of the Court below in a different mold. The Petitioners contend that the Opinion of the Court below transcends the bounds of judicial review permitted under the doctrine of the *Hope* case, and that the Court below has invaded the realm of the administrative function and has substituted its judgment for that of the Commission in requiring that a determination should be made with respect to a fair rate of return, and with respect to the factors affecting the balance between the investor and consumer interests on such matters as the inclusion of property wholly or partially obsolete. The Petitioners further contend that these issues, particularly that relating to a determination of the fair rate of return, was not properly presented to the Court and that, accordingly, the Court could not appropriately take such issues into consideration.

Proceedings Before the Commission.

The Respondent as an individual rate payer did not enter an appearance in the proceedings before the Commission and was not a party thereto, although the Federation of Citizens Associations of the District of Columbia, with whom he is affiliated as Chairman of its Public Utilities Commission did enter an appearance, and an extensive presentation was made before the Commission on behalf of consumer interests. The Federation is a corporation organized under the laws of the District of Columbia and its members are various civic organizations in the community, whose members in turn are residents of the District of Columbia and members of the gas consuming public. The Respondent and the Federation jointly filed a petition for reconsideration (R. 135-145). The Appellee and the Federation took a joint appeal from the order to the Commission (R. 15), but the Federation was dropped as a party as not showing the

proper statutory interest to maintain the action. The Respondent appeared *pro se* before the District Court and successfully argued his own case. Upon the appeal by Petitioners herein from the order of the District Court vacating and setting aside the order of the Commission, the Respondent enlisted the aid of the counsel who are on this brief.

The order of the Commission found a rate base of approximately $32,240,000.00, which includes an amount of approximately $1,744,665.00, representing so called unrecovered cost of abandoned property (West Plant) allocable to the operation of the gas company in the District of Columbia and an amount of approximately $2,700,000.00, representing the unamortized portion of expenditures made by the company in converting customers' appliances for the use of natural gas (R. 88-89; Ex. 19 at R. 603). The Commission authorized the amortization of these items over a period of ten years by annual charges to income (R. 98-99). The Commission also accelerated depreciation of East Plant over the same period of time (R. 98, 727-730). These charges to income aggregate approximately $1,000,000 per annum, and are responsible in large measure for the gas company's request for increased rates.

1. Revenues.

The application of the gas company to the Public Utilities Commission requested an emergency increase of its operating revenues by $900,000.00 on an annual basis (R. 67-75). This application was unsupported by specific rate schedules, which were introduced toward the close of the proceedings before the Commission. In its Findings and Opinion, the Commission rejected the rate schedule proposed by the Commission on the grounds that the rates proposed would result in the production of revenues in excess of $900,000.00 per annum. In reaching this conclusion the Commission pointed out that the revenues estimated to be obtained from proposed rate schedules were based on therm sales actually

made during the calendar year 1948, and that the application of the proposed rate schedules to therm sales during the test year ended May 31, 1949, adjusted for normal temperature conditions, would undoubtedly produce in excess of $900,000.00 (R. 103). The Commission further pointed out that the proposed rate schedules did not take into account growth and volume of business resulting from the connection of additional customers or to reduction in revenue requirements needed to serve a probably declining rate base, which would follow from the amortization of abandoned property and costs of conversion to natural gas. It is also clear from the record that the proposed rates did not take into account revision of certain accounting procedures relating to allocation of promotional costs between operations in the District of Columbia and outside of the District, and to the allocation of costs between utility operations and the non-utility operations of merchandising and jobbing of appliances, which would result in the reduction of operating expenses (R. 90-98). However, the Commission itself made no findings as to future revenues or expenses and no specific forecast of the effect of the rate schedules approved under future conditions.

The rate schedule actually ordered effective was stated by the Commission to be designed to produce annual revenues of $750,000.00 when applied to the sales of gas in the District of Columbia during the calendar year 1948 (R. 104). However, the Commission made no finding with respect to what revenues the rates would produce during the period the rates would be in operation. While the Commission, in rejecting the rates proposed by the company indicated that rates based on the 1948 consumption of gas would have to be subjected to substantial adjustments to reflect normal temperature conditions, the connection of additional customers, and reduced revenue requirements, the Commission made no attempt to reflect such adjustments. For this reason, it is impossible to determine what revenues the rates would produce and what return such revenues would produce, and

whether such return would be a fair return. No estimate of earnings under the rate schedule is made by the Commission and none can be ascertained from the Findings and Opinion. Without such an estimate of the probable future earnings during the period when the rates would be in effect, the Commission's conclusion that the rates are reasonable is obviously arbitrary. The only thing which safely can be said about the revenue which would be produced by the rate schedules is that such revenue would be in excess of $750,000.00 per annum.

Although the Commission did not require that a full record be developed with respect to probable growth in the business, the record does contain isolated bits of evidence on this point which indicates that the connection of new customers in 1949 and 1950 would substantially increase the company's sales. It was stated by a company witness that 95% of the new homes being built in Washington will use gas for space heating (R. 562). This same witness stated that by October, 1949, there were approximately 2,500 more space heating customers than there were at the end of 1948 (R. 560). The record further indicated that the full potential of space heating customers had not been realized due to an order of the Commission in effect between February 1948, and February 1949, restricting the connections of additional space heating customers (R. 787-788). On the basis of evidence in the record to the effect that each space heating customer would produce approximately $100 to $150 revenue per annum, it is clear that the proposed rates would produce revenue substantially in excess of $750,000.00 (R. 398, 487, 569 and Ex. 16 at R. 594).

2. Rate Base.

The Court of Appeals pointed out that there was also lack of clarity and probable lack of evidentiary support for the Commission's conclusion with respect to the rate base (R. 1053). The Court below stated that an examination of the

record "leaves some doubt as to whether the basic valuation figure, of which the present rate base is said to be a projection, represents original cost, reproduction cost, or some other 'fair value' figure." The Court further referred to the failure of the Commission to specifically refer to the basic valuation order or to make any references to the net additions, subsequent to the date of that order.

These comments by the Court below highlight one of the fatal inadequacies in the record before the Commission. While the Commission purports to have made its rate base determination on the basis of the principles of the prudent investment theory, there is no support in the record for a conclusion that the rate base of approximately $32,240,000 found by the Commission reflects unrecovered dollars actually invested in the business. In the first place, it must be recognized that the origins of the company extend back to 1848, and that because of the antiquity of the company there was no complete record of the original cost of the properties. In its valuation order of March 19, 1935 (R. 796-912), the Commission specifically stated that: (R. 887)

> "After carefully considering the entire record we conclude that the original cost of the property cannot be ascertained on this record."

The fact that the property accounts of the Commission were not stated at original cost was again adverted to in an opinion of ex-Commissioner Hankin, concurring in part and dissenting in part, to a rate proceeding in 1943. (R. 944)

Moreover, the record also shows a second and probably more substantial deviation of the rate base from a reflection of unrecovered dollars actually invested in the business. From 1935 through 1947, the company's rates were regulated by agreement pursuant to a sliding scale arrangement unique to the District of Columbia and an alternative to normal regulation. The sliding scale agreement was terminated by action of the Commission prior to the commencement of this proceeding. (R. 737-750, 782-785) This method

of regulation of rates is based on § 43-317 of the District of Columbia Code. (1940) Under the Public Utilities Commission Order inaugurating the sliding scale system of rate regulation for the gas company the initial rate base as of June 30, 1935 was set at $21,000,000.00. (R. 739) This rate base did not purport to represent unrecovered dollars actually invested in the business and was an agreed rate base limited, in the words of the Commission, "for the purposes of such arrangement only." (R. 739) The sliding scale arrangement was put into effect on December 13, 1935 (R. 727). On March 19, 1935, the Commission issued its Order No. 1341, after a comprehensive valuation investigation (R. 796). In that order the Commission found $15,039,000.00 as a final value for the property of the gas company within the District of Columbia as of June 30, 1932 (R. 908). It is important to keep in mind that this valuation was based on cost of reproduction and all other facts normally considered in connection with the "fair value" theory of valuation (R. 799). Ex-Commissioner Hankin, in his opinion referred to above, pointed out that the sliding scale rate base of $21,000,000.00 not only included no deduction for depreciation, but was higher than reproduction cost new as of 1933, plus net additions up to June 30, 1935, and included as of that date approximately $821,000.00, representing the carrying value of land in excess of its original cost (R. 943-944). Upon abandonment of the sliding scale the rate base thereunder, subject to an adjustment of approximately $700,000.00 representing the excess of book accruals for depreciation over the sliding scale depreciation accruals made during the period the sliding scale arrangement was in effect, was carried forward as the rate base of the company (R. 717, R. 585 (Ex. 11), R. 603 (Ex. 19)).

It is thus clear that for many years past the depreciation reserve has been accrued on the basis of inflated property accounts.

In the light of these relevant facts, which were matters of official record with the Commission, it was incumbent upon

the Commission to make further inquiry in order to justify the premise used in its Findings and Opinion that past rates would have been higher if larger depreciation accruals had been permitted. Such an inquiry would include an examination into the historical earnings of the company to determine if they were in fact excessive.

This is the context in which the Court of Appeals held that the order of the Commission was invalid because of the inadequacies of the record and findings with regard to rate of return, abandoned property and the standby plant. It is apparent from the foregoing that the Commission had no record upon which it could make findings either with respect to the revenues to be generated by the new rates or the risks of the business assumed by the investors for which they should now be compensated. There is a complete absence of record and findings with respect to the historical facts upon which a determination could be made that the cost of the abandoned plant and the standby plant have not been recovered by the investors, or whether, if in fact such costs have not been recovered, the investors enjoyed a rate of return in the past which compensated them for assuming the risk of such loss. Prior to the instant case, which is the first occasion on which the Commission has applied the prudent investment formula to this company, the Commission's theory of rate regulation was identified with the fair value cases. As the Court of Appeals points out, under that theory the rate of return allowed the gas company must of necessity have included compensation for the risk of obsolescence, since, under that theory, it was not normal to include in the rate base property not used and useful in the public service.

Quite apart from the historical factors bearing on the balancing of the investor and consumer interest, the Commission made no inquiry into the return necessary under current conditions to attract capital necessary to the operation and growth of the enterprise. In the absence of an inquiry

into such considerations, it is manifest that no conclusion as to reasonable rates supportable under juridical standards could be made.

ARGUMENT.

In our view, these petitions do not raise any questions requiring further review by this Court.

The Petitioners have specified many errors alleged to have been committed by the Court of Appeals, but these assignments of error are overlapping and do not contain a clear cut statement of the issues involved. It would seem that many of the assigned errors are merely unmeritorious arguments, do not raise justiciable issues and can be summarliy dismissed. In this category is the argument that the decision of the Court of Appeals is of nationwide importance. In support of this argument, the decision of the Court below is represented to have general importance, because the Court of Appeals stated that the governing statutes in the District of Columbia give the Public Utilities Commission the same broad authority as is possessed by the Federal Power Commission under the Natural Gas Act. This is clearly a spurious contention which is worthy of no further comment beyond the statement that all orders of the Federal Power Commission are not of general importance. Petitioners also seek to raise the order of the Court below to national significance by the specious argument that the decisions of the Commission will tend to discourage the wide use of natural gas. In response, it must simply be stated that the only apparent deterrent to a universal use of natural gas is the limitation of the nation's natural gas reserves and the location of interstate transmission facilities. It should be pointed out that the assertion that the principles set forth in the opinion below penalize investors in gas distribution companies to the advantage of consumers, simply raises the question of reasonableness of rates, and does not answer it.

This decision is of importance only in the District of Columbia. It involves no constitutional question; in fact, no Federal question, but only the authority of the local regulatory commission to fix rates under a local statute without consideration of pertinent facts necessary to determine the reasonableness of the rates to consumers.

1. The Scope of Review Delineated in the Hope Case Does Not Prohibit a Court of Appeals from Invalidating an Order of an Administrative Agency on the Grounds of Absence of Necessary Findings and Lack of Substantial Evidence.

The Petitioners contend that the action of the Court below, in vacating the Commission's order on the grounds of inadequacy of findings and records, is contrary of decisions of this Court. The Commission expressly raises this question on Page 25 of its petition, and this contention pervades the entire argument of the Company. This issue squarely raises the question of whether the judicial review permitted under the doctrine of the line of decisions centering around the *Hope* case, precludes the Court of Appeals from inquiring into whether the Commission has made all the necessary findings and whether those findings are supported by substantial evidence. It is clear that no such limitation on the scope of judicial review was affected by the doctrine of the *Hope* case. The thrust of the *Hope* case is that judicial review is limited to a determination of whether the total effect of the rate order meets the statutory requirement of justness and reasonableness.

It requires no extended argument to realize that a reviewing Court cannot perform this function under a scope of review which is so limited as to preclude the Court from determining whether proper findings have been made and whether such findings have the evidentiary support required by the statute. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586; 86 L. Ed. 1037, 1050. In that case, the Court pointed out that under the Natural Gas Act,

the Commission's findings of fact "if supported by substantial evidence, shall be conclusive." As indicated by the opinion below, § 43-706 of the District Code contains a similar standard which provides that:

> "the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary or capricious."

In *Colorado Interstate Gas Company* v. *Federal Power Commission,* 324 U. S. 581, 595, 89 L. Ed. 1206, 1219, this Court has expressly stated that the judicial review is not intended to become a perfunctory process. In *Colorado-Wyoming Gas Company* v. *Federal Power Commission,* 324 U.S. 626, 634; 89 L. Ed. 1235, 1241, this Court amplified its views with respect to the scope of judicial review. It was there said that:

> "But we must first know what the 'finding' is before we can give it that conclusive weight. We have repeatedly emphasized need for clarity and completeness in the basic or essential findings on which administrative orders rest* * * Their absence can only clog the administrative function and add to the delays in rate-making. We cannot dispense with them for Congress has provided the standards for judicial review under this Act, § 19 (b). The courts cannot perform the function which Congress assigned to them in the absence of adequate findings. Nor are they authorized under §19 (b) to make findings and substitute them for those of the Commission."

Mr. Justice Frankfurter's remarks in the dissenting opinion in *City of Yonkers* v. *United States,* 320 U.S. 685, 694; 88 L. Ed. 400, 406, makes clear that judicial review extends to findings not specifically required by statute. In that opinion it was said:

> "But the Courts have also spoken of the need of findings as the basis of validity of an order of the Interstate Commerce Commission in the absence of a Congressional direction for findings. The requirement of

> findings in such a context is merely part of the need for courts to know what it is that the Commission has really determined in order that they may know what to review. 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' See *United States* v. *Chicago M. St. P. & P. R. Co.*, 294 U.S. 499, 509-511, 79 L. Ed. 1023, 1031, 1032, 55 S. Ct. 462."

It is clear from the foregoing that the court below did not exceed its proper scope of review in holding invalid the order of the Commission on the grounds of inadequacy of finding and record. The contention of the Petitioners to the contrary is at odds with the precedents cited above. The weakness of the Petitioner's contention in this regard is that it would reduce the reviewing function to a perfunctory process, contrary to the statute and the decisions.

2. The Court of Appeals in Invalidating the Order of the Commission on the Grounds of Inadequacy of the Record and Findings with Regard to the Rate of Return, Abandoned Property, and the Standby Plant Did Not Substitute Its Judgment for That of the Commission in the Selection of a Formula for the Determination of the Reasonableness of the Rates.

The Court below observed that the Commission made no inquiry whatsoever of the issues necessary to determination of a fair rate of return. The Court particularly noted the absence of any record or finding with respect to the costs of capital and the absence of any comparative data with respect to returns on investments in other enterprizes similarly situated. With respect to abandoned property and the standby plant, the Court below did not object to the inclusion of such items in the rate base. Following the *Hope* case, the Court held that inclusion of these items in the rate base, however, must meet the test of justness and reasonableness to the consumer as well as to the investor. The Court, was concerned because it observed that the

Commission had not considered the essential factors upon which justness and reasonableness could be determined.

The Court held that it was essential to ascertain whether the investors had in fact recovered their investment in the abandoned property and the standby plant, and, if this investment had not been recovered, whether the rate of return allowed in the past and the historical earnings have compensated the investors for assuming the risk of obsolesence. Recognizing that such determinations must be made in the first instance by the Commission, the Court held that in the absence of findings made pursuant to an inquiry, it would be impossible to determine whether the rates meet the statutory standards of reasonableness and justness.

The Petitioners contend that in applying these standards, the Court below exceeded a proper scope of judicial review and imposed its judgment upon the Commission in contravention of the *Hope* case. This contention is wholly without merit.

The holding of the Court below that a finding as to a fair rate of return was necessary was predicated on the assumption that the prudent investment theory of rate regulation, purportedly adopted by the Commission, requires such a finding. That a finding of a fair rate of return is essential in the application of the prudent investment theory is too well established by the cases of this Court to permit any doubt. Mr. Justice Brandeis, in his dissenting opinion in *Missouri ex rel. Southwestern Telephone Company* v. *Public Service Commission,* 262 U.S. 276, 291, 67 L. Ed. 981, 986, specifically stated that the reasonableness of a rate under the prudent investment theory is dependent upon several subsidiary conclusions, one of which is the fair rate of return. Mr. Justice Brandeis also held that the measure of a fair rate of return depends, in part, upon the return required to attract capital to the enterprise. The Commission did not consider future conditions under which the proposed tariffs would be applicable with respect to their effect upon cost of capital or rate of return and made no basic findings on this subject.

The later cases of this Court have affirmed Mr. Justice Brandeis' holding as to the essentiality of a finding with respect to a fair rate of return in determining the reasonableness of rates under the prudent investment theory. *Colorado Interstate Gas Company* v. *Federal Power Commission, supra,* 605; *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission,* 324 U. S. 635, 649-650, 89 L. Ed. 1241, 1251; *Federal Power Commission* v. *Hope Natural Gas Company, supra,* at 603; *Federal Power Commission* v. *Natural Gas Pipeline Co., supra,* at 596. The Opinions of this Court in both the *Hope* case at pages 603-605, and the *Natural Gas Pipeline* case, at pages 596-597, set out in detail the type of factual support required for determination of a fair rate of return. The record before the Commission was totally deficient of any evidence of this character.

Similarly, the requirement of the Court of Appeals that the record should contain evidence with respect to whether the investors actually had any unrecovered investment in West Plant and East Plant, and, if so, whether the historical earnings and rate of return allowed have compensated them for the risk of obsolescence of such properties, is inherent in the *Hope* doctrine. As this court has repeatedly said, the application of the prudent investment theory is designed to reflect a proper balance between the rights of investors and consumers. Since it is clear from the Commission's opinion that the reasonableness of the present rates was not predicated upon a consideration of these problems, the rates cannot be said to strike the balance between investors and consumers which is basic to a reasonable rate. If the investors have in the past been compensated for the risk of obsolescence, or if they presently have no unrecovered dollars in the property already abandoned, and to be abandoned, a rate designed to afford the investors additional payments with respect to these properties patently would be unfair. In the light of such of the history of the company as appeared in the record, the Court

of Appeals was of the opinion that the probabilities of unfairness in this area were so great as to require an inquiry into the problems. It is submitted that in this regard the Court below was logically carrying out the doctrines enunciated by this Court in the *Hope* case.

The Court below has had occasion in an earlier case, where it was challenged as substituting its judgment for that of a Commission, to amplify the view it has expressed in the present case. *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 163 Fed. 2d 433. In that case the Court said at page 452:

> "Be that as it may, the Commission, even though expert, is forbidden to be arbitrary. And the courts are directed to prevent it from being so. The Commission cannot, and we do not understand it to claim that it can, shield arbitrariness by averments of its own infallibility, by technical expressions, or by failure to state adequate reasons for its conclusions. . . The Commission says that the court has substituted its judgment for that of the Commission. The Court has not done so. That contention in the present case is merely the recitation of a favorite cliche of administrative tribunals whose findings and conclusions have been queried by a court."

The Opinion of the Court below in the *Mississippi River* case is pertinent on the general problem involved in the present case of whether the action of the Court below constitutes a substitution of its judgment for that of the Commission, or is a proper exercise of its duty to require that findings of the Commission have adequate and proper evidentiary support. The following is taken from page 449 of that case:

> "The Commission cannot announce the applicability of a formula and then distort its application by failure to find accurately the factors required by the formula, or by departing from the essential progress of the formula from premise to conclusion. When the Commission announces principles or formulae as applicable

> the validity of its order can be determined only by measuring what it does against the principles it announces. This is so not only upon the authority of *Securities Comm'n* v. *Chenery Corp.*, but because any other course would permit an administrative agency to announce a proper principle and, under that protection, achieve an improper result by unrevealed considerations wholly apart from the announcement. The prescribed judicial review would be set wholly at naught by any such procedure. In so far as the Commission purported to act upon its own informed judgment, apart from formulae or general principles, its findings and reasons must be clearly and completely shown."

In the absence of findings and evidence with respect to a fair rate of return, the Petitioners contend that this deficiency is supplied by a prior rate proceeding in 1945. The Court below referred to earlier rate proceedings in which the factors relevant to a determination of a fair rate of return were considered, but held that such earlier considerations had no probative effect in the current case. It must be observed that, quite apart from the merits of the Petitioners contentions in this regard, the argument only points out that the Petitioners disagree with the view of the Court below on the question of substantial evidence. This court does not normally grant review for the purpose of determining whether the Court of Appeals is correct in its view that findings do not have the requisite evidentiary support.

It is submitted that the Court below properly rejected evidence in proceedings during the war years and under "sliding scale" regulation as determinative of what a fair rate of return should be in 1949. In support of the Court, it need only be pointed out that, between the date of the earlier cases and 1949, great changes occurred in the economic, financial, and regulatory background. The unregulated economy of 1949, which was adjusting itself to the changes in our national life brought about by the consequences of the war, was different from the controlled economy of the

war years. Factors affecting the cost of money similarly were different in the two periods, and the change of the company from a distributor of mixed gas to a distributor of straight natural gas also would have a bearing on the cost of its capital. Of equal if not greater significance is the fact that during the war years, the company's rates were determined on a sliding scale basis, which has substantial differences from normal rate regulation.

For these reasons, it is submitted that the Court below was correct in its holding that the prior proceedings were inadequate to supply the essential findings with respect to a fair rate of return.

3. The Court of Appeals Was Not Precluded from Considering the Rate of Return.

The petition of the Commission before this Court alleges in effect that Respondent failed to include in his petition for reconsideration before the Commission any specific objection to the inadequacy of the findings and record with respect to rate of return, the abandoned property and the standby plant. The Company, in its petition before this Court, is a bit more restrained, and makes this contention only with respect to the rate of return. It is contended that § 43-704 of the District Code, providing that no litigant may on appeal urge any ground not set forth in a petition for reconsideration filed with the Commission, precludes the Court of Appeals from deciding the appeal on grounds not preserved in a petition for reconsideration.

We believe the contention of Petitioners is without merit.

Respondent's petition for reconsideration is quite comprehensive (R. 135-145), and expressly raises the question of whether the investors have failed to recover the costs of the abandoned property. (R. 137-138). The Respondent in discussing the abandoned property, expressly referred to it as "so-called unrecovered cost of abandoned property". (R. 137). Moreover, the Respondent specifically set forth that the record fails to show that the company suffered net

losses in the past, or failed to earn a fair return, after giving effect to such loss as may have resulted from abandonment of the property. (R. 138). The petition also specifically states, "The evidence of record does not disclose the earnings of the company throughout the life of the property concerned." (R. 138). The petition further stated: (R. 138).

> "How can it be said 'that the exclusion of this item (unrecovered cost of abandoned property) from the rate base would deprive investors of a return on an investment originally made to furnish utility service', when the actual return of the company during the life of the property has not been determined?"

With respect to the issue of a fair rate of return, Respondent's petition for reconsideration specifically charged that "the rates approved are unreasonable and unjust to consumers, and would permit the company to earn an excessive rate of return." (R. 137). In amplification of this contention, the Respondent stated: (R. 139).

> "Only on the theory that stockholders assume the risks of losses under certain circumstances, such as result from a change in the art with resulting obsolescence, can a return of 6 percent or more to the utilities be justified. If such risks are to be removed, the return permitted should not exceed that realizable upon non-speculative high grade bonds."

In the light of these specific references in the Respondent's petition for reconsideration, it is clear that the issue of adequacy of return was adequately preserved. The determination of the adequacy of the findings to permit judicial review is clearly a matter of judical determination.

It must also be pointed out that a comprehensive petition for reconsideration was filed before the Commission on behalf of another litigant. (R. 155-161). That petition also sets forth the issues discussed in the Opinion of the Court below.

In addition to being in error on the facts, the Petitioners are also in error as to the applicable legal principles. The weakness of the contention is that it proves too much. If Petitioners are correct, the reviewing courts would be presented with the dilemma of being unable to set aside a patently unreasonable rate because a consumer litigant may not have specifically urged invalidating grounds, despite the statutory requirement that the rates be just and reasonable. It is the duty of the courts on review to protect against arbitrary administrative action and to make certain that the Commissions' conclusions as to the reasonableness of rates have a foundation in fact. Section 43-704 of the District of Columbia Code does not operate as a restriction on the power of the Court, but is a limitation directed to the litigants.

It is manifestly unsound to contend, as the Petitioners do, that the matter of a fair rate of return was not in issue. The question of a fair rate of return is always in issue in a rate proceeding. Moreover, that issue is also inherently part of the determination of rates under the prudent investment theory. Having adopted that theory, the Commission was under the obligation to take into consideration all the factors required by the formula; the reasoning must progress logically from premise to conclusion.

It is submitted that from the foregoing, it is clear that all the issues were properly before the Court of Appeals and that the court did not exceed its proper scope of review.

In considering Section 43-704 of the District of Columbia Code, it must be remembered that many of the orders of the Public Utilities Commission are issued without formal notice or hearing and a petition for reconsideration may be the first protest or reference to deficiencies therein. The present record on the contrary was quite extensive and all issues were the subject of evidence, argument or specific motion prior to the issuance of the final order.

Even if we were to assume, *arguendo,* that the issues were not properly before the Court, the Court would have power on its own motion to consider questions of law which were neither presented nor passed upon by the administrative agency in order to prevent a miscarriage of justice. *Hormel* v. *Helvering,* 312 U.S. 552, 557, 85 L. Ed. 1037, 1041. It is clear from that Opinion that the Court below was under the duty to review the case on all the issues involved even if there had been a failure on the part of Respondent to properly raise all the issues.

CONCLUSION.

The petitions present no issues requiring further review. The case is concerned with the fixing of local rates under a local statute, presents no constitutional or federal questions, and is not in conflict with decisions of this Court, or with decisions in any of the Circuits. In view of all of the foregoing, it is respectfully submitted that the petitions should be denied.

Respectfully submitted,

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APPENDIX.

D. C. Code, (1940) 43-301

"Every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished, or rendered, or to be furnished or rendered, shall be reasonable, just and non-discriminatory. Every unjust or reasonable or discriminatory charge for such facility or service is prohibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the commission created by this section."

D. C. Code, (1940) 43-704

"* * * Any public utility or any other person or corporation affected by any final order or decision of the commission may, within thirty days after the publication thereof, file with the commission an application in writing requesting a reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration. No public utility, or other person or corporation shall in any court urge or rely on any ground not so set forth in said application. The commission, within thirty days after the filing of such application, shall either grant or deny it. Failure by the commission to act upon such application within such period shall be deemed a denial thereof. If such application be granted, the commission, after giving notice thereof to all interested parties, shall, either with or without hearing, rescind, modify, or affirm its order or decision. The filing of such an application shall act as a stay upon the execution of the order or decision of the commission until the final action of the commission upon the application: *PROVIDED,* That upon written consent of the utility such order or decision shall not be stayed unless otherwise ordered by the commission. No appeal

shall lie from any order of the commission unless an application for reconsideration shall have been first made and determined."

D. C. Code, (1940) 43-706

"In the determination of any appeal from an order or decision of the commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary or capricious."